

E-Filed 4/6/10

WILLARD K. TOM
General Counsel

LISA D. ROSENTHAL, Bar # 179486
KERRY O'BRIEN, Bar # 149264
EVAN ROSE, Bar # 253478
ERIC D. EDMONDSON, D.C. Bar # 450294
Federal Trade Commission
901 Market Street, Ste. 570
San Francisco, CA 94103
(415) 848-5100 (voice)
(415) 848-5184 (fax)
lrosenthal@ftc.gov
kobrien@ftc.gov
erose@ftc.gov

Attorneys for Plaintiff
Federal Trade Commission

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

FEDERAL TRADE COMMISSION,

Plaintiff,

V.

SWISH MARKETING, INC., a
corporation,

MARK BENNING, individually and as an officer of SWISH MARKETING, INC.,

MATTHEW PATTERSON, individually
and as an officer of SWISH
MARKETING, INC., and

JASON STROBER, individually and as
an officer of SWISH MARKETING,
INC.,

Defendants.

Case No. C09-03814 RS

Hearing Date: TBD
Hearing Time: TBD
Courtroom: 4, 5th Floor

**[xxxxxx] STIPULATED
ORDER TO FILE AMENDED
COMPLAINT UNDER
TEMPORARY SEAL**

1 **I. INTRODUCTION AND PROCEDURAL HISTORY**

2 The Federal Trade Commission (“FTC”) filed a complaint (Dkt. #1) in this matter
3 on August 19, 2009. On February 22, 2010, this Court issued an order granting
4 Defendant Mark Benning’s motion to dismiss the FTC’s complaint as to him. (Dkt. #60)
5 In the order, the Court granted the Commission leave to amend its Complaint but did not
6 set a deadline by which it needed to do so. On March 8, 2010, Defendants Swish
7 Marketing, Inc. (“Swish”), Matthew Patterson, and Jason Strober, but not Defendant
8 Benning, filed an administrative motion, requesting that the Court impose a filing
9 deadline for an amended complaint. (Dkt. #64) On March 12, 2010, the Court entered an
10 order setting a deadline of April 5, 2010, for the FTC to file an amended complaint as to
11 Defendant Benning. (Dkt. #69)

12 The parties now stipulate to the filing of the FTC’s First Amended Complaint
13 under a temporary seal. The amended complaint may contain certain material submitted
14 by the defendants pursuant to, or in lieu of, compulsory process. Pursuant to 16 C.F.R.
15 4.10(g), such material may be disclosed by the FTC in court proceedings. Prior to
16 disclosure of such material in a proceeding, the FTC must afford the submitter “an
17 opportunity to seek an appropriate protective or in camera order.” *Id.* The defendants
18 will not have had an opportunity to review the contents of the First Amended Complaint
19 until it has been filed with the Court herewith. To allow the defendants an opportunity to
20 seek an appropriate protective order over protected material if they so desire, the parties
21 agree to the procedure set forth below.

22 **II. PROPOSED PROCEDURE FOR SEEKING AN APPROPRIATE
23 PROTECTIVE ORDER**

24 So that the defendants may seek an appropriate protective order over material that
25 they submitted to the FTC pursuant to, or in lieu of, compulsory process that is contained
26 in the FTC’s First Amended Complaint, the parties agree to the filing of the First
27 Amended Complaint under temporary seal, as follows:

- 28 1. The defendants shall have until April 19, 2010 to file a motion with the

Court, seeking an appropriate protective order over material contained in the FTC's First Amended Complaint, pursuant to 16 C.F.R. 4.10(g);

2. The FTC shall have until May 3, 2010, to respond to any such motion filed by any defendant;
 3. If no defendant has moved for a protective order by April 19, 2010, then the seal shall automatically be lifted, with no further action required by the Court or any party, and the FTC's First Amended Complaint shall be placed on the public record; and
 4. If any defendant has moved for a protective order by April 19, 2010 as to any portion of the First Amended Complaint, then the Complaint shall remain under seal until the Court has issued its ruling on the defendants' motion/s.

IV. CONCLUSION

The parties respectfully request that the Court temporarily seal the FTC's First Amended Complaint as set forth above.

Respectfully submitted,

DATED: April 5, 2010

/s/ Lisa D. Rosenthal
LISA D. ROSENTHAL
KERRY O'BRIEN
EVAN ROSE

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

(The filer attests that concurrence in the filing of this document has been obtained from each of the other signatories.)

DATED: April 5, 2010

/s/ Michael A. Thurman
MICHAEL L. MALLOW
MICHAEL A. THURMAN
LOEB & LOEB LLP

1 Attorneys for Defendants
2 SWISH MARKETING, INC. and
3 MATTHEW PATTERSON

4 DATED: April 5, 2010

5 /s/ Brian Grossman
6 BRIAN GROSSMAN
7 TESSER & RUTTENBERG

8 Attorneys for Defendants
9 SWISH MARKETING, INC.,
10 MATTHEW PATTERSON, and
11 JASON STROBER

12 DATED: April 5, 2010

13 /s/ Donald P. Gagliardi
14 DONALD P. GAGLIARDI
15 ELIZABETH D. LEAR
16 BERGESON, LLP

17 Attorneys for Defendant
18 MARK BENNING

19 PURSUANT TO STIPULATION, IT IS SO ORDERED:

20 DATED: 4/5/10

21 
22 RICHARD SEEBORG
23 UNITED STATES DISTRICT JUDGE